

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT CHICHI RUIZ,

Defendant and Appellant.

D059387

(Super. Ct. No. FVI901609)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Miriam I. Morton, Judge. Judgment affirmed as modified.

Gilbert Chichi Ruiz appeals from a judgment entered upon his conviction for the attempted voluntary manslaughter of Rafael Mercado and Ryan Espinoza (counts 1, 2), assaulting these individuals with a deadly weapon (counts 3, 4), and street terrorism (count 5). The jury found true that: (1) Ruiz personally used a knife in committing counts 1, 2 and 5; (2) promoted a criminal street gang in committing counts 1 to 4; and (3) personally inflicted great bodily injury in counts 1, 3 and 5.

Ruiz contends: (1) the evidence did not support the gang enhancements or the counts for attempted voluntary manslaughter; (2) the trial court improperly ordered him to pay \$150 for court appointed attorney fees; and (3) the trial court should have stayed the consecutive sentence imposed for count 5, or, alternatively, should have stayed the four-month sentence on the count 5 deadly weapon enhancement. We reject his first contention, but agree that the \$150 for court appointed attorney fees must be stricken and that the sentence on count 5 must be stayed under Penal Code section 654.

(Undesignated statutory references are to the Penal Code.)

FACTUAL AND PROCEDURAL BACKGROUND

On an evening in July 2009, Mercado and his brother, Espinoza (together the victims), went to a birthday party in Victorville. There were about 15 to 20 people at the party, including their sister, Vanessa Nunez, and her friend, Brenda Schenck Bazan. Mercado met Ruiz at the party and shook his hand. Espinoza also remembered introducing himself to Ruiz and Ruiz's brother, codefendant Richard Arreola (together defendants).

At one point, Brenda realized that her camera and her friend's camera were missing. She asked the victims to accompany her to ask people if they had seen the cameras. When they approached Ruiz who was standing next to a truck containing two male passengers and asked the men if they had seen two cameras, the men replied, "'We're Mexican but we're not thieves.'" Brenda told the men that she was not accusing them of stealing, but that she just wanted to know if they had seen her camera. After one

of the men in the truck asked Brenda why Mercado and Espinoza were with her, she realized that the men probably thought they were "'trying to start something.'"

Ruiz suddenly stepped behind Brenda and hit Mercado in the head. At that point, everyone started screaming, telling the defendants to leave. After the defendants got in a car, someone threw a cup or a can at the windshield. The defendants got out of the car and charged the victims. The four men fought for a couple of minutes, then the defendants ran to their car and drove away. After the fight ended, Espinoza realized that he and Mercado had been stabbed.

Tajma Hassan, one of Brenda's friends, also attended the party. She claimed that after the victims arrived, Arreola had a "'weird look'" on his face suggesting anger. She observed the fight and saw the defendants leave in a car. After the victims were helped inside the house, she went outside and saw a cell phone and sunglasses on the driveway that she picked up. She took the items inside the house, went back outside and saw that defendants had returned and heard the word "'quete,'" which meant gun. Both defendants got out of the car, and Tajma saw something in Arreola's hand that looked like a gun. Ruiz appeared to be looking for something on the ground, so Tajma handed him the cell phone and glasses. Tajma then heard Ruiz state: "'I'm sorry. But you don't mess with,'" and he said a word that Tajma could not remember.

Enrique Bazan, Brenda's brother, accompanied her to the party. At one point in the evening, he became aware of an altercation in the front yard and he watched four people fight for a minute or two. After the victims were on the ground, the defendants got in their car and left as others helped the victims inside the house. He stated that the

defendants then came back because one of them had dropped their cell phone. Both of the defendants got out of the car and one of them yelled, "Where's my phone?" That person then said something to a neighbor that was standing outside about "'South Sider'" or "'I'm from South Side.'" The neighbor responded, "'That's what I'm talking about,'" and the men then touched hands. One of the defendants picked something off the ground and then both defendants left. Enrique did not remember anything about the neighbor other than the fact he was Hispanic.

The victims were transported by helicopter to the hospital where Espinoza stayed overnight and Mercado stayed for two weeks.

DISCUSSION

I. *Sufficiency of the Evidence*

A. *General Legal Principles*

When a defendant challenges the sufficiency of the evidence to support his conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) The same standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft, supra*, at p. 1053.)

B. *Gang Enhancements*

1. Facts

Los Angeles County Sheriff Deputy Julius Gomez testified as a gang expert. He is familiar with the Compton Varrio Largo gang and knows that the gang commonly uses several abbreviations or symbols, including "'CVL36,'" "'L'" or "'L36.'" CVL stands for Compton Varrio Largo and CVL36 is shorthand for "Compton Varrio Largo Compton's Finest." Some of the primary activities of the Compton Varrio Largo gang include vandalism, vehicle thefts, grand thefts, burglary, robbery, illegal firearms possession, narcotics sales, assaults with deadly weapons, attempted murder and murder.

Deputy Gomez explained that "South Sider" was a generic term representing all Hispanic gang members from Southern California. Gang members in custody may be South Siders who are aligned with the Mexican Mafia, or northerners who are aligned with the "'Nuestra Familia.'" The Mexican Mafia is a prison gang that controls a lot of criminal activity inside and outside the prison system. Outside the prison system, the Mexican Mafia wields its power and influence by taking a percentage of an aligned gang's criminal enterprise and creating truces. Because of this, street gangs based out of Los Angeles are expanding into other states and countries with the hope of increasing their profits.

In 2008, Ruiz admitted his membership in the Compton Varrio Largo gang to law enforcement officers. However, after the incident, Ruiz stated that he had moved out of Compton and responded, "'Yes and no,'" when asked if he was still an active CVL gang member. Arreola claimed to be an inactive member of the San Gabriel Sangra gang.

Deputy Gomez saw that Ruiz had the phrase "'CVL36'" tattooed on the inside of his left middle finger which signified his gang membership. Ruiz also had the letters "'LA'" tattooed on his chest and the back of his head, which is a tattoo commonly used by Hispanic gang members in Los Angeles County to show their alliance with the South Sider gang group and the Mexican Mafia. Gomez noted that Ruiz had very short hair so that he could "proudly display" his tattoo and warn others that he was a gang member aligned with the South Siders and the Mexican Mafia. However, at the time of trial, Ruiz's hair was much longer, and Deputy Gomez believed that Ruiz grew out his hair to make the tattoo less noticeable for his court appearances. Ruiz had the number "13" tattooed behind his left ear to signify the letter "M," the thirteenth letter in the alphabet, to show his allegiance to the Mexican Mafia. Finally, the letters "'CPT'" tattooed above Ruiz's right knee was an abbreviation for the City of Compton, which is worn by gang members based out of the Compton area.

Deputy Gomez stated that respect plays a "very big factor" within Hispanic gangs and that these gangs are very organized with strict rules. Hispanic gangs may address a person that has disrespected them with "a verbal admonishment all the way to murder and everything in between." When asked a hypothetical question matching the facts of this case, Deputy Gomez opined that the acts benefited the gang in two ways, by elevating the personal status of the perpetrator within the gang by showing his willingness to commit violent crimes and elevating the gang as a whole. Deputy Gomez explained that gangs have been expanding into different areas and that the willingness of a gang to intimidate others and commit crimes outside its area in an effort to expand will benefit the gang in

the future. Deputy Gomez further explained that one of the main goals of a criminal street gang is to intimidate future witnesses and prevent them from notifying police about criminal activity out of fear of gang retaliation.

The prosecutor added to a hypothetical question that the defendants were members of different gangs. Based on this information, Deputy Gomez opined that the gang membership ties between the two defendants "almost obligate[d] the other gang member to actively participate" in the crime or risk being labeled a coward. He explained that the ramifications of not participating in the crime could range from a verbal reprimand, to a physical beating or murder. Thus, when one of the defendants got out of the car to fight, the other defendant was obligated to get out of the car and join the fight. Accordingly, assuming the defendants were brothers, Deputy Gomez opined that this made no difference in his determination of whether defendants committed the crimes for the benefit of the gang.

Adding to the hypothetical that the crimes were committed in San Bernardino County, which is away from Compton, Deputy Gomez opined that this expansion opened up another area for gang criminal activities and put everyone on notice in San Bernardino County that a Compton gang is committing criminal acts in their area and there would be ramifications for resisting, thereby enhancing their ability to commit future acts in that area. Even if no one at the party knew that Ruiz was a member of CVL, Deputy Gomez opined that Ruiz's acts benefited Ruiz within the gang by establishing him as someone who commits violent acts in a certain area to promote his gang. Deputy Gomez mentioned some people would understand that the "'LA'" tattooed on the back of Ruiz's

head represented some sort of gang affiliation and he did not believe that the tattoo meant Ruiz was a Los Angeles Dodgers fan because of the other gang related tattoos on Ruiz's body.

In a hypothetical situation where after the stabbing, the defendants returned to look for their cell phones with Arreola holding a gun in his hand down to his side, Deputy Gomez believed these facts showed gang members imposing their will on others and creating an atmosphere of fear and intimidation to the other people at the party. Even assuming Arreola did not have a gun, Gomez believed it was "all pretty brazen that they would just come back and look for a cell phone."

The day after the stabbing, sheriff's deputies searched the home shared by defendants. They collected several CDs from Arreola's room containing gang writing specific to the Compton Varrio Largo gang and the symbol for the number 13 that stands for the Mexican Mafia. They also obtained a photograph from Arreola's bedroom depicting Arreola, Ruiz, and a man making a hand gesture that appeared to depict the letters "C," "V" and "L."

2. Analysis

Ruiz contends the evidence did not show he committed the offenses "for the benefit of, at the direction of, or in association with [a] criminal street gang," and "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Specifically, he asserts that nothing about the crimes suggested they were gang related and the testimony from the prosecution's gang

expert that the crimes were gang related lacked factual foundation, was speculative and thus not entitled to any weight.

We review the sufficiency of the evidence to support enhancement allegations under the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) A jury may rely on expert testimony about gang culture and habits to reach a true finding on a gang enhancement allegation (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930) and may reasonably rely on the testimony of a single witness, unless the testimony is physically impossible or patently false. (Evid. Code, § 411; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

As a threshold matter, Ruiz forfeited any argument regarding the gang expert's opinion testimony by failing to lodge a timely objection below. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [claim that impermissible expert opinion was admitted was not preserved on appeal where no objection was lodged at trial].) Nonetheless, to forestall a possible habeas corpus petition based on counsel's performance, we will address his contention on the merits.

The People can present expert testimony on criminal street gangs to prove the elements of the gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) Additionally, a gang expert's response to a prosecutor's hypothetical questions, although based on evidence-specific assumptions, if properly based on evidence at trial, is admissible and not rendered inadmissible by the fact, if true, that the testimony

pertained to ultimate issues to be decided by the trier of fact. (*People v. Vang* (2011) 52 Cal.4th 1038, 1042-1049.) At trial, the prosecutor posed hypothetical questions which asked Deputy Gomez to assume various facts based on the evidence. The prosecutor's questions were proper and, in response, Deputy Gomez, a gang expert, properly gave his opinions.

We now turn to the evidence which suggested Ruiz's crimes were gang related. Ruiz bore tattoos signifying his alliance with the South Siders, the Mexican Mafia and the Compton Varrio Largo gang. After the incident, Arreola claimed to be an inactive member of the San Gabriel Sangra gang; however, sheriff's deputies found a number of CDs in Arreola's room containing gang writing specific to the Compton Varrio Largo gang and the symbol for the number 13 that stands for the Mexican Mafia.

The incident started when Brenda, accompanied by the victims, asked two men in a truck and Ruiz if they had seen two cameras. After the men replied that they were not thieves, Ruiz suddenly hit Mercado in the head. Thereafter, Espinoza heard one or both of the defendants say, "'What's up, homie?'" in a challenging manner. Although it initially appeared that the defendants would leave, someone then threw something at their windshield. At that point, the defendants got out of their car and charged the victims, apparently stabbing them multiple times.

The defendants left, but immediately returned to look for something they dropped. This time, Arreola was armed with what looked like a gun. One of the defendants made a gang reference to a neighbor about "'South Sider'" or "'I'm from South Side.'" Another

person heard Ruiz state: "I'm sorry. But you don't mess with,'" and a word the person could not remember.

In light of this evidence, Deputy Gomez's testimony was necessary to explain why a gang member would choose to respond with violence when asked about missing cameras and after having an item thrown at a windshield. Deputy Gomez stated that respect is very important within Hispanic gangs and a gang member may address a person that has disrespected him with violence. Deputy Gomez explained that such violence benefits the gang by elevating the personal status of the perpetrator within the gang, which then elevates the gang as a whole.

Deputy Gomez also noted gang expansion into different areas as a means of increasing gang profits. This trend may lead gang members to intimidate others and commit crimes outside their area to help expand the gang and thereby benefit the gang in the future. The crimes also put everyone on notice in San Bernardino County that a Compton gang is committing criminal acts in their area, demonstrate ramifications for resisting and thus enhance the ability of the gang to commit future acts in that area. Deputy Gomez explained that some people would understand that the "'LA'" tattooed on the back of Ruiz's head represented some sort of gang affiliation. Even if no one at the party knew that Ruiz was a member of the Compton Varrio Largo gang, Deputy Gomez opined that Ruiz's acts benefited Ruiz within the gang by establishing him as someone who commits violent acts in a certain area to promote his gang.

Based on this testimony, the jury could have reasonably inferred that Ruiz committed the crimes for the benefit of a criminal street gang. (*People v. Albillar* (2010))

51 Cal.4th 47, 63 ["Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)."].) Although there was evidence from which the jury could have concluded the crimes were personal rather than gang related, it was up to the jury to resolve this issue. We have no power to reweigh the evidence, make credibility determinations or substitute our conclusion for the jury's. (*Id.* at p. 60.)

C. Attempted Voluntary Manslaughter

Ruiz contends his attempted murder convictions must be overturned because the evidence was insufficient to show he possessed the requisite intent to kill. We disagree.

Attempted voluntary manslaughter requires proof of a specific intent to kill. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550.) The intent to kill may "be inferred from the defendant's acts and the circumstances of the crime." (*People v. Smith* (2005) 37 Cal.4th 733, 741.) "'Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552.) "[T]he degree of the resulting injury is not dispositive of defendant's intent" and "a defendant may properly be convicted of attempted murder when no injury results." (*People v. Avila* (2009) 46 Cal.4th 680, 702.)

Here, the defendants initially started to pull out of the driveway to leave, but then returned, got out of the car armed with knives or other sharp objects and attacked the

unarmed victims. Dr. Wesley Fung, the physician that treated Mercado, stated that Mercado suffered an injury to his left arm, some large lacerations and two "fairly large" and deep stab wounds to his back. Mercado required that a tube be inserted into his chest because he had injured his lung causing air to escape. Mercado suffered a spleen injury, which was surgically repaired along with a two to three centimeter laceration to his diaphragm.

Dr. Fung stated that about 90 percent of stab wounds he sees involve only the skin and muscle and that it takes a "pretty direct force like a jabbing force" to penetrate into the abdominal cavity from the chest. Based on the location of the wounds, Dr. Fung opined that they could have been life-threatening had the knife been aimed in a different direction. For example, had the knife been in a "slightly separate direction," it would have hit Mercado's heart and killed him quickly. Also, the stab wound to Mercado's back resulted in a leak of the cerebral spinal fluid, meaning the injury was very close to Mercado's spinal cord.

Espinoza suffered two stab wounds to his right flank and one to his buttock. Dr. Eugene Kwong, Espinoza's physician, was concerned about the right flank wound because it was close to the liver, kidney, intestines and major veins. However, test results revealed that Espinoza only suffered injuries to his skin and muscle, which were then closed. Although Espinoza's actual wounds were not life-threatening, Dr. Kwong opined that the wounds could have been life-threatening if the trajectory of the knife had been different. He described penetrating injuries to the main torso of a person as the "kill zone."

The brevity of the attack, which resulted in stab wounds to the torsos of both victims, suggest the defendants acted purposefully. The totality of the circumstances, including the manner of the attack and the location of the penetrating wounds on both victims, was sufficient to support a finding of intent to kill. (*People v. Arias* (1996) 13 Cal.4th 92, 162 [if "jury found defendant's use of a lethal weapon with lethal force was purposeful, an intent to kill could be inferred, even if the act was done without advance consideration and only to eliminate a momentary obstacle or annoyance"].)

II. Section 654

Section 654 provides that "[a]n act . . . that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Where a defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Ibid.*) A defendant's intent and objective are factual questions for the trial court (*People v. Coleman* (1989) 48 Cal.3d 112, 162) and its determination will be upheld if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Ruiz contends that the sentence for count 5, street terrorism, must be stayed under section 654 because this count arose only as a result of his commission of attempted voluntary manslaughter (counts 1, 2) and assault with a deadly weapon (counts 3, 4) while intending to promote a criminal street gang. The Attorney General concedes, and we agree that the sentence on count 5 should have been stayed under section 654.

III. *Court Appointed Attorney Fees*

Ruiz contends the trial court did not comply with statutory procedures when it ordered him to reimburse the county \$150 for appointed counsel fees under section 987.8. He asserts the court did not give him notice of the hearing, make an express finding of his ability to pay, or find what was a reasonable fee. The Attorney General argues that Ruiz forfeited this claim on appeal because he failed to object to the award below. Assuming the claim was not waived, the Attorney General urges us to remand the matter to the trial court for further proceedings to determine if the award was properly assessed.

As a preliminary matter, the People's forfeiture argument is contrary to the holding in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*). The court in *Viray* rejected a forfeiture argument on two independent grounds, finding a forfeiture (1) could not be based on the failure of the public defender to object to his or her own fees and (2) never applies to a sufficiency of the evidence claim. (*Id.* at pp. 1215-1217; accord, *People v. Butler* (2003) 31 Cal.4th 1119, 1128 [sufficiency of evidence claims are not subject to forfeiture].) Although the People argue against the first holding, they ignore the second. As we discuss below, the evidence in the record was insufficient to support the award.

A court may order defendant to pay the cost of court-appointed counsel after a hearing to determine if defendant has the ability to pay. (§ 987.8, subd. (b).) "At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the following rights: [¶] (1) The right to be heard in person. [¶] (2) The right to present witnesses and other documentary evidence. [¶] (3) The right to confront and cross-examine adverse witnesses. [¶] (4) The right to have the evidence against him or her disclosed to him or her. [¶] (5) The right to a written statement of the findings of the court. [¶] If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (*Id.*, subd. (e).)

In considering defendant's ability to pay, the court shall consider defendant's present financial condition and his reasonably discernable future financial position for a period of no more than six months from the date of the hearing. (§ 987.8, subd. (g)(2).) There exists a statutory presumption that a defendant who has been sentenced to state prison does not have an ability to pay "[u]nless the court finds unusual circumstances" that demonstrate otherwise. (*Id.*, subd. (g)(2)(B).) Thus, when a defendant has been sentenced to state prison, the trial court must make an express finding that unusual circumstances exist before the court may order a defendant to pay a portion of the cost of the legal assistance provided him. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537.)

Here, the trial court held no hearing on Ruiz's ability to pay and there was no evidence in the record to support a finding that he had the ability to pay. Rather, the record shows that he had no assets and that his arrest caused him to lose his job that had paid \$8 per hour. Further, although the court sentenced Ruiz to prison for 23 years, it failed to make a finding that this was an unusual case or to otherwise acknowledge the statutory presumption that a defendant sentenced to prison has no financial ability to reimburse the costs of his defense. Accordingly, even when drawing all reasonable inferences in favor of the judgment, the attorney fees order cannot stand.

The question remaining is the appropriate remedy. The People argue that the matter should be remanded to the trial court for an opportunity to conduct a noticed hearing on the issue. (*People v. Flores* (2003) 30 Cal.4th 1059, 1061, 1068.) Ruiz asserts it would be a waste of "judicial resources" to remand for further proceedings, in that there is no evidence to suggest he has the ability to pay and he was sentenced to state prison. We agree with Ruiz.

Unlike *People v. Flores, supra*, 30 Cal.4th 1059, in which our Supreme Court concluded that "a showing of unusual circumstances was conceivable" because the probation report stated that the defendant possessed a substantial amount of jewelry at the time of sentencing (*id.* at p. 1068), the People have not directed us to anything in the record that suggests the existence of unusual circumstances to rebut the presumption that Ruiz lacks the ability to pay attorney fees, nor have we found any indication of unusual circumstances in our review of the record on appeal. Judicial economy compels us to strike the order imposing attorney fees.

DISPOSITION

The judgment is modified to strike the order assessing attorney fees in the amount of \$150 or any amount and to stay the sentence on count 5 under Penal Code section 654. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and forward it to the Department of Corrections and Rehabilitation.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.